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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 621

JAMES OLIVER, ET AL., *Petitioners*,

v.

STEWART L. UDALL, Secretary of the Interior,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

James Oliver, Della Oliver, Ambrose Lee, Hola Tso, Jack Clark, Kee Todacheene, Dudley Yazzie and Danny Yellowhair petitioners herein, pray that a writ of

certiorari issued to the United States Court of Appeals for the District of Columbia to review the judgment of that court entered July 26, 1962 which affirmed the action of the district court granting respondent's motion for summary judgment and dismissing petitioners' complaint.

OPINIONS BELOW

The opinion of the Court of Appeals has been reported at 306 F. 2d 819 and is set out in Appendix A, *infra*, at pages 1a-7a. The district court did not write or deliver an opinion.

JURISDICTION

The judgment of the court below was entered on July 26, 1962. On October 22, 1962 Chief Justice Warren granted an extension of time to file this petition to and including November 30, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF QUESTIONS PRESENTED

1. Does "approval" by the Secretary of the Interior of an ordinance adopted by the Navajo Tribe of Indians curtailing the freedom to worship of tribal members constitute "federal action" subject to the proscriptions of the First Amendment?

2. Is the Secretary of the Interior exempted in this case from ordinary limitations upon the powers of Government officials because the guarantees of religious liberty set forth in the United States Constitution do not apply to the acts of domestic Indian tribes?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

CONSTITUTION OF THE UNITED STATES:

First Amendment:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; * * *.

STATUTES:

Revised Statute § 463, 25 U.S.C. § 2:

> *Duties of Commissioner.* The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeable to such regulations as the President may prescribe, have the management of all Indian Affairs and of all matters arising out of Indian relations.

REGULATIONS:

25 CFR § 11.1(e):

> Nothing in this section shall prevent the adoption, by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been approved by the Secretary of the Interior they shall be controlling, and the regulations of this part which may be inconsistent therewith shall no longer be applicable to that tribe.

25 CFR § 11.87 NH:

> Peyote Violations. Any Indian who shall introduce into the Navajo country, sell, use or have in his possession within said Navajo country, the bean know(n) as peyote, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 9 months, or a fine not to exceed $100.00 or both.

STATEMENT OF THE CASE

Petitioners are Navajo Indians, citizens of the United States, and members of the Native American Church, a religious organization which fosters and promotes a belief in God, adherence to moral principles and a spirit of self-respect and brotherly love among Indian Tribes throughout the United States and Canada (J.A.[1] 4-5, 24). Although many Navajos are members of the Native American Church, they constitute a religious minority of the Navajo Tribe. Prior to 1940, the Navajo members of the Native American Church were permitted to practice their religion free of federal and tribal restraints. Among thes religious practices was the use of peyote as an indispensable part of their prayer and ritual (J.A. 5, 24).

In 1935, the Secretary of the Interior promulgated a model code for the maintenance of law and order on Indian reservations within the United States, 25 CFR § 161, *et seq.*, now codified as 25 CFR § 11, *et seq.* Two years later, the Navajo Tribe adopted a law and order code directly patterned after the existing federal model and submitted it to the Secretary for adoption as a regulation of the Department of Interior. The proposed regulation was approved by the Secretary on June 2, 1937.

On June 3, 1940, the Navajo Tribal Council adopted Resolution No. CJ-1-40 requesting the Secretary to amend the law and order code by the addition of a new offense, to wit: the sale, use or possession on the Navajo Reservation of a substance known as "peyote", part of a small cactus identified botanically as lophop-

[1] The letters "J.A." refer to the appendix as printed for the use of the court below.

hora williamsii and used for sacramental purposes in the ceremonies of the Native American Church (J.A. 19, 24-25, 29). The Council resolution was not self-operative, but required the approval of the Secretary of the Interior before becoming effective (J.A. 11-12). Thereafter, the Commissioner of Indian Affairs recommended that the Secretary approve the ordinance because "the authority of the Navajo Tribal Council * * * should be respected." He emphasized however that "(1) peyote is not a habit-forming or deleterious drug, and (2) its ceremonial use is, in the minds of the members of the cult, truly a religious one" (J.A. 13). On December 18, 1940, the Acting Secretary approved the Tribe's request, and the anti-peyote penal ordinance went into effect as an amendment to the departmental regulation (25 CFR § 11.87 NH).

On January 6, 1959, the Navajo Tribal Council, acting pursuant to 25 CFR § 11.1(e),[2] adopted the law and order code of the Department of the Interior, with amendments, as tribal law (J.A. 26, 29). This resolution was also subject to approval by the Secretary of the Interior. On February 11, 1959, the Commissioner of Indian Affairs, as the Secretary's duly authorized delegate, approved the resolution "subject to the condition that if the Commissioner * * * should subsequently find that the law and order program at the Navajo Agency is not being administered to the best interests and welfare of the Navajo people, the Commissioner reserves the right to revoke his approval

[2] 25 CFR § 11.1(e) provides: "Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been approved by the Secretary of the Interior they shall be controlling . . ."

* * *" (J.A. 26, 29, R. 36). Such approval has never been revoked and the anti-peyote penal ordinance has been in continuous full force and effect on the Navajo Reservation since December 18, 1940, and has been, and is being, vigorously enforced by the Navajo police and courts. As a consequence, petitioners and other Indians who subscribe to the tenets of the Native American Church have been unable to use peyote in their religious ceremonies on the Navajo Reservation except upon pain of arrest, fines and imprisonment (J.A. 8, 26).

REASONS FOR GRANTING THE WRIT

The court below has decided an important question of federal law which has not been, but should be, settled by this Court. While the immediate impact of the decision below is directed against the religious freedom of 33,000 Navajos who are members of the Native American Church, it will also inhibit proselytizing and may encourage other Indian tribes to seek approval of penal ordinances designed to prevent acceptance of a form of religion not in keeping with those tribes' traditions and concepts of religious orthodoxy. The impact of the decision below requires review by this Court particularly where, as here, the Secretary of the Interior is prohibited by the First Amendment from approving a tribal resolution which prefers one religion over another. *United States* v. *Ballard*, 322 U.S. 78; *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 642.

The decision below has an even more far-reaching effect. The court below, while acknowledging federal participation, stated that "the Secretary has done no more than approve action which the Navajo Tribe

was entitled to take."[3] It thereby relieved federal officers and agencies exercising control over non-federal organizations from constitutional and statutory prohibitions whenever such prohibitions are not directly operative upon the controlled organization. The court said: "It is our view that the Secretary's approval of the tribal action in 1959 was entirely in keeping with that abstinence from federal intervention in the internal affairs of an Indian tribe which the law clearly requires." (*Infra*, App. A, p. 6a). However, when a tribal resolution is adopted pursuant to federal regulation; when it cannot be implemented without federal approval; when federal approval is granted subject to a continuing power of revocation, this can hardly be federal "abstinence." *Railway Employees Dept.* v. *Hanson*, 351 U.S. 225, 232. Had Congress never authorized the Secretary to "have the management of all Indian Affairs" (Rev. Stat. § 463, 25 U.S.C. § 2) and had the Secretary not exercised his managerial powers by arrogating to himself the right to approve or disapprove tribal penal ordinances, the "Questions Presented" would not arise. But when the Secretary exercises these powers he must do so within the limits of the Constitution. *Public Utilities Commission* v. *Pollak*, 343 U.S. 451, 462-463.

The court below misapplied this Court's comment in *Williams* v. *Lee*, 358 U.S. 217, 223:

> "The cases in this court have consistently guarded the authority of Indian Governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it." (App. A, *infra*, p. 6a).

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[3] App. A, *infra*, at p. 5a.

The instant case does not turn upon the propriety of the Secretary's controls over tribal action. Here it is undisputed that he imposed control, the tribe acceeded to the imposition of such control, and the Secretary exercised such control. No federal official can excuse his violation of the Constitution by suggesting that the result would have been the same even if he had abstained from violating it.

CONCLUSION

By reason of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16613

JAMES OLIVER, ET AL., *Appellants*,

v.

STEWART L. UDALL, Individually and as Secretary of Interior, *Appellee*.

Appeal from the United States District Court for the District of Columbia

---

Decided July 26, 1962

Before DANAHER, BASTIAN and BURGER, *Circuit Judges*.

DANAHER, *Circuit Judge:* Our appellants are eight Navajo Indians who reside on the Navajo Indian Reservation.[1] They filed in the District Court "an action for a declaratory judgment to declare section 11.87NH of the Code of Indian Tribal Offenses, 25 CFR § 11.87NH (1953) ('Peyote Violations'), null and void, invalidly authorized and unconstitutional." Appellants had alleged that they are members of the Native American Church, and as such, they

[1] Established pursuant to the treaty proclaimed August 12, 1868, 15 STAT. 667.

consider the use of peyote[2] to be "indispensable to their prayers, rites and ceremonies." They further alleged that due to certain actions of the Secretary of the Interior,[3] they were unlawfully deprived of the use of peyote. Their motion for summary judgment was denied, the Secretary's cross motion was granted and the complaint was dismissed.

The Secretary of the Interior on June 2, 1937 approved a law and order Code of Tribal Offenses, applicable on Indian reservations. At that time no mention was made of peyote. On June 3, 1940 the Navajo Tribal Council adopted its Resolution No. CJ-1-40 which recited in part that "during the last few months great quantities of peyote" had been brought into the Navajo reservation; the use of peyote is not connected with "any Navajo religious practice" and is harmful and foreign to the Navajo traditional way of life. The Resolution thereupon embodied a section denouncing as "an offense against the Navajo Tribe" the sale, use or possession within the Navajo country of the "bean known as peyote."

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[2] The complaint alleged that peyote "consist of the tops of a small cactus, botanically identified as Lophophora Williamsii," the principal ingredients being alkaloids, of which the most important is mescaline. When taken or administered in accordance with the customs, rites and rituals of the church, the complaint alleges, "peyote is not a substance deleterious to human life or health, is not habit-forming and does not result in addiction."

The Secretary's answer states that he has taken no position and made no findings as to whether peyote is or is not deleterious or habit forming, and avers that "Congress has included peyote within its definition of the term 'habit-forming narcotic drug,' 42 U.S.C. sec. 201(j)." [That section includes, inter alia, opium, with its alkahod derivatives morphia, heroin, and codeine; coca leaves and the derivatives cocaine; Indian hemp and its derivatives "and peyote in its various forms."]

[3] Originally named as defendant in the District Court was Fred A. Seaton. On appellants' motion the District Court substituted the incumbent, Stewart L. Udall, Secretary of the Interior.

The Acting Secretary of the Interior on December 18, 1940 approved the Tribal Resolution, and added to the Secretary's 1937 law and order Code a subsection which read:

> "*Peyote violations. Any Indian* who shall introduce into the Navajo country, sell, use or have in his possession within said Navajo country, the bean known as peyote, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 9 months, or a fine not to exceed $100, or both." (Emphasis added.) [See 25 C.F.R. § 11.87NH (1958)]

That action of the Acting Secretary on December 18, 1940 was attacked in the appellants' first prayer for relief now before us which reads:

> "(1) That the action of defendant's predecessor on December 18, 1940 in approving Resolution No. CJ-1-40 as adopted by the Navajo Tribal Council on June 3, 1940 be declared null and void, and invalidly authorized and in violation of the First Amendment to the Constitution of the United States."

We have concluded that the appellants have failed to show the existence of a present case or controversy with respect to the Secretary's action in 1940. That action was superseded in 1959 and so has been rendered moot because of facts and circumstances to which we next advert.[4]

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[4] The appellants alleged that the Secretary in June, 1960, had rejected their demand that he revoke his predecessor's approval of the 1940 Tribal Resolution. Thus appellants' second prayer for relief must likewise fall insofar as appellants asked:

"(2) That the action of defendant in failing and refusing to revoke, rescind or withdraw the prior approval granted to Resolution No. CJ-1-40 be declared null, void, illegal and in violation of the First Amendment to the Constitution of the United States and that defendant's action be declared arbitrary and capricious . . . ."

On January 6, 1959, the Navajo Tribal Council by Resolution No. CJA-1-59 adopted as tribal law the law and order Code or regulations of the Department of the Interior, with amendments, which until that time had been generally applicable to Indian tribes. As authorization for its action the Tribe had relied on the Secretary's regulation, 25 C.F.R. § 11.1(e) (1958) which reads:

> "Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been approved by the Secretary of the Interior they shall be controlling, and the regulations of this part which may be inconsistent therewith shall no longer be applicable to that tribe."

In so adopting as tribal law all those sections which might be applicable to the Navajo Indians, the Navajo Tribe, by its own action, had included specifically 25 C.F.R. §§ 11.76NH-11.87NH (1958). Thus made part of the tribal law was section 11.87NH, *supra*, "*Peyote violations.*"

The Secretary on February 11, 1959 approved that action by the Navajo Tribe, thus and thereby consenting to the supersession of 25 C.F.R. Part 11. The Secretary's law and order Code was no longer to apply to the Navajo Tribe. In necessary consequence the only prohibition thereafter to be applied against the introduction by an Indian into the Navajo Indian reservation, or the sale or the use of peyote by an Indian "within said Navajo country" was to be found in what the Navajo Tribe itself had adopted as tribal law.

Appellants' complaint did not challenge that 1959 approval by the Secretary. They would have had us say that the 1940 approval by the Secretary was an unlawful act, beyond his powers in that Congress had never authorized the Secretary to take that step. But 25 U.S.C. § 2 (1958) provides:

"*Duties of Commissioner.* The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations."

Appellants, no doubt, would want us to say with respect to the Secretary's 1959 approval of the Tribal action that the Secretary, in effect, has unlawfully, in violation of appellants' First Amendment rights, prohibited the free exercise of religion by these appellants. But the Secretary has done no more than approve action which the Navajo Tribe was entitled to take. Moreover, his affidavit of record discloses that "neither he nor any employee of the Department of the Interior acting under his direction or supervision has threatened or intends to threaten the plaintiffs, or any of them, with arrest, fine or imprisonment because of their alleged use of peyote on the Navajo Indian Reservation." Cf. *Poe* v. *Ullman*, 367 U.S. 497, 501, 507 (1961). It may be noted that First Amendment rights were asserted in behalf of the Native American Church,[5] of various named plaintiffs as its members, and of all others similarly situated, in *Native Ameri-*

[5] The Secretary's answer avers that he is "without knowledge or information sufficient to form a belief as to the truth" of certain allegations concerning the church, its purposes, objectives and practices.

Not all religious "practices" are beyond the reach of the law. Reynolds v. United States, 98 U.S. 145, 166-67 (1879); Cleveland v. United States, 329 U.S. 14, 20 (1946).

It would appear that "The Native American Church" was oringally incorporated under the laws of Oklahoma, October 10, 1918. La Barre, The Peyote Cult 170 (1959). The author notes in his preface that "there are at present over one thousand bibliographic items on the ethnography of peyotism and related subjects."

can Church v. *Navajo Tribal Council*.[6] There the District Court refused to enjoin enforcement of the tribal ordinance banning peyote. The Court of Appeals affirmed a judgment dismissing the complaint.

While it is so that Congress retains paramount authority to legislate for and enforce its laws on all the tribes[7] in certain respects, only in special instances has it done so.[8] Otherwise, as the Supreme Court so recently stated:

> "The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.'"[9]

We have interpolated the foregoing discussion only because appellants in their complaint had asked "for such other and further relief which to this Court may seem just and proper." It is our view that the Secretary's approval of the tribal action in 1959 was entirely in keeping with that abstinence from federal intervention in the internal affairs of an Indian tribe which the law clearly requires.

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[6] 272 F. 2d 131 (10 Cir. 1959).

[7] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); cf. United States v. Quiver, 241 U.S. 602, 604 (1916).

[8] See, e.g., 18 U.S.C. §§ 1152-53 (1958); and see Kake Village v. Egan, 369 U.S. 60, 63 (1962).

[9] Williams v. Lee, 358 U.S. 217, 223 (1959); cf. Barta v. Oglala Sioux Tribe of Pine Ridge Reservation, 259 F. 2d 553 (8 Cir. 1958), *cert. denied*, 358 U.S. 932 (1959); Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res., 231 F. 2d 89 (8 Cir. 1956); compare Metlakatla Indians v. Egan, 369 U.S. 45, 50-54 (1962).

The Secretary had simply recognized the valid governing authority of the Tribal Council.[10]

We conclude that the appellants have failed to present more than an abstract question, and in such a situation, the District Court in any event, in the exercise of its discretion might properly have withheld the entry of a declaratory judgment.[11] Relief had been sought against the Secretary, both individually and officially. Since in our view the Secretary acted properly as an official, it follows that the District Court correctly entered summary judgment and thereupon dismissed the complaint. The Secretary was entitled to judgment as a matter of law."[12]

Affirmed.

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[10] Implicit in the 1868 treaty with the Navajo Tribe "was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed. Since then, Congress and the Bureau of Indian Affairs have assisted in strengthening the Navajo tribal government and its courts." Williams v. Lee, *supra* note 9, 358 U.S. at 221-22; cf. Kake Village v. Egan, *supra* note 8.

[11] Cf. Poe v. Ullman, 367 U.S. 497 (1961); Public Affairs Press v. Rickover, 369 U.S. 111 (1962); Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945).

[12] Cf. Larson v. Domestic & Foreign Corp., 337 U.S. 682, 693, 695 (1949).

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BRIEF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, AMICUS CURIAE, IN SUPPORT OF PETITION FOR CERTIORARI

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Respondent.

BRIEF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, AMICUS CURIAE, IN SUPPORT OF PETITION FOR CERTIORARI

Counsel for the parties have consented in writing to the filing of a brief in the above-entitled case on behalf of the Association on American Indian Affairs, Inc., as *amicus curiae.*

INTEREST OF AMICUS CURIAE

The Association on American Indian Affairs is a nationwide organization of American citizens of which Oliver La Farge of Santa Fe, New Mexico, is President. The Association has as one of its chief purposes the safeguarding of the rights of American Indians. The interest of the Association in the instant case is to assist this Court in seeing that the rights vested by the Constitution and laws of the United States in Indians residing on the Navajo Reservation

are as fully protected as the rights of any of their fellow-citizens.

The object of this *amicus curiae* brief in support of the petition for certiorari is to illuminate a basic misconception by the court below concerning the legal status of reservation Indians. More specifically, and contrary to the lower court's assumptions, the Association maintains that the Secretary of the Interior is not exempt from ordinary limitations upon the powers of Federal officials on any theory that powers of Indian tribal governments are not restricted by the guarantees of religious freedom set forth in the United States Constitution. It is respectfully submitted that our discussion will materially aid the Court's consideration of the second question presented in the instant case—a question which possesses significance far beyond the outcome of this litigation.

REASONS FOR GRANTING THE WRIT

Underlying the decision below absolving the Secretary of the Interior from responsibility for an infringement upon the religious freedom of reservation Indians is the erroneous assumption that the provisions of the Federal Constitution protecting personal liberty and individual property rights do not apply to the acts of Indian tribes. This belief stems from an unwarranted extension of this Court's holding in *Talton* v. *Mayes*, 163 U.S. 376 (1896), that the Fifth Amendment requirement of grand jury indictment does not govern the operations of tribal courts. In a number of instances, the lower Federal courts have extended the rationale of the *Talton* ruling, which involves a remedial right, to negate fundamental rights of reservation Indians under the Constitution. See *e.g.*, *Martinez* v. *Southern Ute Tribe*, 249 F. 2d 915 (10th Cir.

1957); *Native American Church* v. *Navajo Tribal Council*, 272 F. 2d 131 (10th Cir. 1959).

The instant case, therefore, presents this Court with an opportunity to reexamine the tenuous holding of *Talton* and to instruct the lower Federal courts that Indian citizens are not without legal recourse in the face of arbitrary or discriminatory tribal action. The *Talton* rule springs from the thesis, articulated at length twelve years earlier in *Elk* v. *Wilkins*, 112 U.S. 94, 99 (1884), that general acts of Congress do not apply to Indians "unless so expressed as to clearly manifest an intention to include them." That specific language of *Elk* v. *Wilkins*, however, was effectively discredited in 1960 by this Court in *F.P.C.* v. *Tuscarora Indian Nation*, 362 U.S. 99, 115-119 (1960). See also *Navajo Tribe* v. *N.L.R.B.*, 288 F. 2d 162, 164-65 (D.C. Cir. 1961). If general acts of Congress now do apply to Indians within their reservations, it cannot logically be said that the Constitution nonetheless does not. See *Kinsella* v. *United States*, 361 U.S. 234 (1960); *Reid* v. *Covert*, 354 U.S. 1 (1957).

CONCLUSION

In view of the foregoing, *amicus curiae* respectfully urges that the petition for a writ of certiorari be granted.

Respectfully submitted,

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In the Supreme Court of the United States

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No. 621

JAMES OLIVER, ET AL., PETITIONERS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 306 F. 2d 819 and is set out in the Appendix to the petition. The district court did not write an opinion.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1962. The time within which to file a petition for a writ of certiorari was extended by Chief Justice Warren to November 30, 1962. The petition for a writ of certiorari was filed November 28, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Does an action against the Secretary of the Interior challenging his "approval" of an ordinance of the Navajo Tribal Council banning the use of "peyote" on the Navajo Reservation present a justiciable case or controversy where responsibility for the enforcement of the ordinance is vested in the police and courts of the Navajo Tribe, not in the Secretary?

STATEMENT

Petitioners seek a declaratory judgment that action taken by the Secretary of the Interior in approving a Navajo tribal resolution banning the use of "peyote" on the reservation was null and void and in violation of the First Amendment to the Constitution of the United States.

Petitioners are members of the Navajo Tribe and of the Native American Church, a religious organization with members and adherents among Indians of many tribes in the United States and Canada (J.A. 4–5, 24).[1] They allege that a substance known as "peyote," consisting of the tops of a small cactus, is used by them for sacramental purposes; is indispensable to the prayers, rites, and ceremonies of their religion (J.A. 4–5); and is neither deleterious nor habit-forming. Although the Secretary, in his answer, took no position as to the harmfulness of "peyote," he did point out that Congress has included this substance within its definition of a "habit-forming narcotic drug," 42 U.S.C. 201(j) (J.A. 19). Four states—

[1] References are to the Joint Appendix to Brief for Appellants printed for use of the court below.

Arizona, California, Colorado, and Montana—have statutes prohibiting the use or possession of peyote.[2]

In 1940, the Law and Order Code of the Department of the Interior (hereinafter called the "departmental Code") was applicable to the Navajo Reservation,[3] the Navajo Tribe having no such code of its own. By Resolution No. CJ–1–40 of June 3, 1940, the Tribal Council requested the Secretary of the Interior to include in the departmental Code a provision outlawing the introduction and use of peyote on the Navajo Reservation. On December 18, 1940, the Acting Secretary of the Interior, upon the recommendation of the Commissioner of Indian Affairs, approved the resolution, and added to the Code a section prohibiting Indians from introducing peyote into, or using it within, the Navajo country. 25 CFR 11.87 NH (formerly 25 CFR, 1941 Supplement, Sec. 161.87 NH).

The departmental regulation remained in force until February 11, 1959. On that date, acting under authority delegated to him by the Secretary of the Interior, the Commissioner of Indian Affairs approved Navajo Resolution No. CJA–1–59, which had been enacted by the Tribal Council on January 6, 1959. By this resolution the Navajo Tribal Council adopted the entire departmental Code (including 25 CFR 11.87 NH) as tribal law. Thereupon, as the Secretary alleged, the departmental peyote regulation

[2] Arizona Rev. Stat. (1956), Sec. 36–1061; California Health and Safety Code (1955), Sec. 11001; Colorado Rev. Stat. (1953), Secs. 48–5–1 *et seq.*, Rev. Code of Montana (1947), Sec. 94–35–123.

[3] Ten major crimes had been made federal offenses. 18 U.S.C. 1153. State law does not apply. *Williams* v. *Lee*, 358 U.S. 217.

ceased to be applicable to the Navajo Reservation (J.A. 19–20, 28).

The Secretary denied that he had threatened to enforce the peyote prohibition on the Navajo Reservation and asserted that he had no intention of doing so (J.A. 21, 28). He further alleged that since the adoption of the departmental Code by the Navajo Tribal Council there had been no regulation of the Department of the Interior prohibiting the use of peyote by Indians on the Navajo Indian Reservation (J.A. 28, 30). On these facts the district court, without writing an opinion, denied the plaintiff's motion for summary judgment, granted that of the defendant, and dismissed the complaint (J.A. 31). The Court of Appeals for the District of Columbia affirmed the dismissal.

In their complaint, petitioners requested a declaration that the action of respondent's predecessor in approving the tribe's 1940 resolution and the failure of respondent himself to rescind that approval were violations of the First Amendment. The court of appeals, in affirming the dismissal, concluded that petitioners had failed to show the existence of a present case or controversy with respect to the 1940 action, since that action had been superseded in 1959 by the adoption of the tribal ordinance banning peyote (Pet. 3a). However, since petitioners had also requested such "other and further relief" as might be deemed proper, the court proceeded to consider the 1959 action as well, declaring (Pet. App. 6a–7a) that "the Secretary's approval of the tribal action in 1959 was entirely in keeping with that abstinence from federal

intervention in the internal affairs of an Indian tribe which the law clearly requires" and had "simply recognized the valid governing authority of the Tribal Council." Moreover, the court emphasized that the Secretary had disclaimed any intention of enforcing the peyote ordinance, and concluded that "appellants have failed to present more than an abstract question * * *."

ARGUMENT

1. This suit for declaratory relief is before the wrong court and against the wrong party. There is no justiciable controversy between petitioners and the Secretary of the Interior. The Secretary has stated categorically that he has no intention to arrest or prosecute petitioners for the use of peyote. Indeed, such action would not lie within his province, since the enforcement of the Navajo Law and Order Code, including the peyote ordinance, is the responsibility, not of the Secretary, but of the tribe itself. True, the Secretary's act of approval in 1959 was a prerequisite to the effective adoption of the ordinance. What gives rise, however, to a justiciable controversy warranting declaratory relief is not the mere existence of an ordinance on the books—much less the bare act of executive or supervisory approval which may have consummated its enactment—but rather the direct and immediate threat that the ordinance will be brought to bear upon the individual complainant by the officials charged with its enforcement. *Poe* v. *Ullman*, 367 U.S. 497. Cf. *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89. It is the action of these officials which the threatened individual seeks to forestall, and it is therefore against them, not the

"legislators," that he must pursue his remedy. Thus, in the present case, petitioners' proper course was to challenge the peyote ordinance in a suit against the appropriate law enforcement officers of the Navajo Tribe. In such an action, they would have been free to contend that the tribal ordinance is ineffective because the Secretary's approval, upon which it depended, was a nullity.

We recognize that there may be impediments to an action against the tribal officers. In *Native American Church* v. *Navajo Tribal Council*, 272 F. 2d 131 (C.A. 10), a class action brought by the Native American Church and some of its members (other than petitioners here) to enjoin the Navajo tribal authorities, on First Amendment grounds, from enforcing the peyote prohibition, the Tenth Circuit affirmed the district court's dismissal of the complaint on the following grounds: (a) that federal courts are without jurisdiction over matters involving purely penal ordinances passed by the Navajo legislative body to regulate life on the reservation; and (b) that the limitations imposed upon Congress by the First Amendment do not apply to legislative action of an Indian tribe. See *Talton* v. *Mayes*, 163 U.S. 376; *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F. 2d 553 (C.A. 8), certiorari denied, 358 U.S. 932; *Toledo* v. *Pueblo De Jemez*, 119 F. Supp. 429 (D.C. N.M.); Felix S. Cohen, *Handbook of Federal Indian Law* (1940), page 123 (revised in Department of the Interior, *Federal Indian Law* (1958), page 398). The merits of that decision, however, are not free from doubt, and it may well be that this Court would uphold the

jurisdiction of the federal courts over such an action.[4] If, on the other hand, the Tenth Circuit was correct in disclaiming jurisdiction, a similar disclaimer would be required here also, since the Secretary's 1959 action was merely a step in the process by which the same tribal ordinance became effective, and since the only practical consequence of a decision for the petitioners would be to render that ordinance unenforceable. The point we emphasize is that if federal courts have any jurisdiction of the subject matter of an action challenging the validity of a tribal ordinance, such jurisdiction may be exercised only in a case in which the true adversaries, *i.e.*, the tribal officials who threaten enforcement, are before the court.

2. Even if the Court grants this petition, it will not be required to reach the "ultimate" constitutional issue, *i.e.*, whether the prohibition against the use of peyote, assuming it to be the product of federal action, amounts to a violation of the First Amendment. Since the district court disposed of the case on summary judgment, and probably on the same grounds adduced by the court of appeals, the record is substantially lacking in evidence or findings as to the

[4] We assume that petitioners would not be bound by the adverse decision rendered against their church and co-religionists in the *Native American Church* case. That action was, in Professor Moore's familiar classification, a "spurious" class action, so that, in his view at least, the judgment entered therein would not be binding upon absent members of the class even if they had full notice of the suit. 3 Moore, *Federal Practice* (1948) 3442-3445, 3465-3468. However, in determining whether the instant case presents a justiciable controversy, it is, of course, immaterial that an action against the tribal officials might be barred by *res judicata*.

nature of peyote and the degree of its harmfulness. We suggest, however, that petitioners' First Amendment claim is, on its face, extremely tenuous. In the Mormon polygamy cases, *Reynolds* v. *United States*, 98 U.S. 145, 166–167, and *Davis* v. *Beason*, 133 U.S. 333, 342–343, 345, this Court made it clear that practices (as distinct from religious beliefs) which endanger the health or welfare of the community as a whole may validly be prohibited even though such practices may be required by a particular religion. As we have pointed out, *supra*, at pp. 2–3, four states have prohibited the use of peyote as a dangerous drug, and Congress has characterized it as a "habit-forming narcotic drug." See also *State* v. *Big Sheep*, 75 Mont. 219, 238–240, 243 Pac. 1067, 1073, in which the Montana Supreme Court held that the Montana statute banning the use of peyote did not infringe the First Amendment rights of an Indian member of the Native American Church, since "[i]t was clearly within the power of the legislature to determine whether the practice of using peyote is inconsistent with the good order, peace and safety of the state."

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 621

JAMES OLIVER, ET AL., *Petitioners*,

v.

STEWART L. UDALL, Secretary of the Interior, *Respondent*.

REPLY FOR PETITIONERS

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REPLY FOR PETITIONERS

I.

Respondent finally admits that his "act of approval in 1959 was a prerequisite to the effective adoption of the [Navajo anti-peyote] ordinance."[1] (Res. Br., p. 5). But despite this admission and his failure to even dispute the importance of the "Questions Presented", respondent argues that the petition should be denied because he does not enforce the ordinance, and, there-

[1] Compare the holding of the court below which treats the Secretary's approval as nothing more than a disavowal of federal authority (Pet., App. A, pp. 6a-7a).

fore, no justiciable controversy exists between him and petitioners (Res. Br. p. 5).

Respondent recommends that petitioners challenge *his* violation of the federal constitution in a suit directed against non-federal officials whose immunity from constitutional restraints has already been established. *Native American Church* v. *Navajo Tribal Council* (10 Cir.), 272 F. 2d 131;[2] cf. *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation* (8 Cir.), 259 F. 2d 553, certiorari denied, 358 U.S. 932. The proposed remedy is no remedy at all.

Upon examination of respondent's argument it is apparent he is really saying that his "act of approval" does not affect petitioners with sufficient "directness" to give them standing to sue. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 153-154 (1951). But where the enforcing authorities have been accorded immunity by reason of tribal "sovereignty", it is plain that petitioners have "standing" to challenge the Secretary's "act of approval." *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 386(1926; *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535-536 (1925); *Terrace* v. *Thompson*, 262 U.S. 197, 214-216 (1923); cf. *Truax* v. *Raich*, 239 U.S. 33 (1915). Here, while it is the tribal authorities who are *actively* enforcing the ordinance,[3] their power, and indeed, their compulsion to act was and continues to be subject to the will of the Secretary. In this sense the relation-

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[2] The Government suggests that the "merits of that decision • • • are not free from doubt" (Res. Br., p. 6). In the court below it urged that the holding was both "sound" and "binding" (Appellee's Br., p. 7).

[3] For this reason, *Poe* v. *Ullman*, 367 U.S. 497 (1961), is completely inapplicable.

ship of the Secretary to the tribe, is the same as the relationship of the Attorney General to the private employer in *Truax* or the Secretary of Defense to the defense contractor in *Greene* v. *McElroy*, 360 U.S. 474 (1959).

If the Secretary's actions may not be challenged in this suit, they are entirely immune from judicial scrutiny. Under such circumstances this Court will not lightly abrogate responsibility for judicial protection of statutory or constitutional rights. *Leedom* v. *Kyne*, 358 U.S. 184, 190 (1958). Respondent's contention that his actions are immune from challenge, only serves to underscore the importance of the "Questions Presented."

II.

Respondent argues that "even if the Court grants this petition, it will not be required to reach the 'ultimate' constitutional issue"[4] since "the record is substantially lacking in evidence or findings as to the nature of peyote and its degree of harmfulness." (Res. Br., pp. 7-8). Respondent is wrong. For purposes of this case, the nature of peyote is not an issue of fact to be resolved by a judicial finding. The facts on which the constitutional issue turns were found by the Commissioner of Indian Affairs who determined that: "by the preponderance of evidence, (a) peyote is not a habit-forming or a deleterious drug, and (b) its ceremonial use is, in the minds of the mem-

[4] We agree that the case can be resolved without reaching the constitutional issue since the court could conclude that the Secretary's actions were in excess of his statutory authority under Revised Statute § 463, 25 U.S.C. § 2.

bers of the cult, truly a religious one." (J.A. 13)[5] A judicial declaration of the validity of administrative action based thereon, can only be made in the light of those findings. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943).

CONCLUSION

By reason of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[5] Lest the Court be misguided by respondent's citation of other "authorities", we note that the Bureau of Enforcement of the Food and Drug Administration does not take the position "that distribution of peyote for use by Indians in traditional ceremonies of a religious nature constitutes a violation of [federal] law" (letter to Native American Church, June 11, 1959); the Legislature of the State of Montana has amended Section 94-35-123 of the Revised Codes to prevent its applicability to the use of peyote "for religious sacramental purposes by any bona fide religious organization incorporated under the laws of the State"; and the state courts of Arizona have held that Arizona Rev. Stat. 36-1061 may not constitutionally be applied to the use of peyote in Indian religious ceremonies. *State of Arizona* v. *Mary Attakai*, Superior Court, Coconino County, Criminal Cause No. 4098, (July 26, 1960), appeal dismissed, Supreme Court of Arizona (April 27, 1961).